Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUZANNE CAHNMANN, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

SPRINT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

CLINTON A. KRISLOV
Counsel of Record
ROBERT J. STEIN III
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 2120
Chicago, Illinois 60601
(312) 606-0500

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

52 pp

QUESTIONS PRESENTED

I. Whether the federal "filed tariff" doctrine creates federal removal jurisdiction over cases asserting purely state law claims for breach of contract, common law, and consumer fraud against a federally regulated communications carrier?

II. If so, whether the Federal Communications Act, in spite of its explicit preservation of state claims, nonetheless implicitly pre-empts all state law claims for equitable relief against deceptive marketing practices?

III. Whether the federal "filed tariff" doctrine protects consumers' rights to enforce a filed tariff's explicit term giving consumers free calls on Fridays for a year over the carrier's attempt to abrogate that provision by merely amending the tariff during the year?

PARTIES TO THE PROCEEDING

Suzanne Cahnmann and Sprint Corporation which has no parent corporation, but Deutsche Telekom and France Telecom are publicly held companies which each own 10% or more of Sprint Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Suzanne Cahnmann, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above titled proceeding on January 7, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on which the petitioner prays for certiorari, is reported at 133 F.3d 484 and is reprinted in the appendix hereto at App. A1-11.

The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (Zagel, J.) finding federal question jurisdiction and entering judgment on the pleadings in favor of the defendant, Sprint Corporation, is reported at 961 F. Supp. 1229, and is reprinted in the appendix hereto at App. B1-9.

JURISDICTION OF THE SUPREME COURT

The Opinion of the Seventh Circuit Court of Appeals was entered on January 7, 1998. No petition for rehearing was filed.

Jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 203

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed

and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 414

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

The Plaintiff filed this case in Illinois state court asserting Illinois state law claims for breach of contract, and common law and consumer fraud. It was brought as a class action on behalf of the plaintiff and all Sprint customers in the United States enrolled or participating in Sprint's one-year "Fridays Free" calling plan (explained below). App. B1.

Sprint's "Fridays Free" Program. Beginning in January of 1996, Sprint advertised and offered for sale a one-year "Fridays Free" calling plan (hereinafter "Fridays Free" or "Free Fridays"). Under this promotion, a small business that selected Sprint as its long distance phone carrier and made a minimum of $50 per month in long distance calls could make free long distance calls anywhere in the world on Fridays for one year. App. A2. These were the terms of the contract between the plaintiff and Sprint, and were also filed in Sprint's tariff.

This promotion induced the plaintiff to switch her long distance carrier to Sprint in mid-January of 1996. Initially, Sprint honored its obligations and allowed the plaintiff and class members to make free calls anywhere in the world on Fridays. App. B1.

In the spring of 1996, however, Sprint unilaterally "modified" the Free Fridays plan by deleting ten countries from the program: Bolivia, China, Ecuador, India, Iran, Israel, Myanmar (formerly Burma), Pakistan, Thailand and the Dominican Republic. Instead, Sprint advised subscribers it would now charge the plaintiff and class members for calls made to these countries, albeit at a "discounted" rate, except for the Dominican Republic. App. A2.

The Complaint. The plaintiff filed suit in Illinois state court, asserting purely state claims for breach of contract, fraud, and deceptive marketing practices, and seeking to enforce the provisions of the contract with Sprint for the promised one year term, and to recover damages for calls that should have been free. App. A1. The complaint does *not* allege any federal claims. App. A1. It asserts *only* state law claims for breach of contract (Count I), violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq.* (Count II), violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.* (Count III), Common Law Fraud (Count IV), and for a declaration under the Illinois Declaratory Judgment Act, 735 ILCS 5/2-701 (Count V).

Removal to Federal Court. Nonetheless, Sprint removed the case to federal court alleging both federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) and diversity jurisdiction under 28 U.S.C.

§ 1332(a). The district court held against diversity jurisdiction. App. B4.

Sprint's notice of removal premised federal question jurisdiction on the "complementary doctrines of complete pre-emption and artful pleading," claiming that the Federal Communications Act ("FCA," "Communications Act" or "the Act") and its "accompanying federal common law completely pre-empt" the state law claims. To make this allegation, Sprint recast the plaintiff's claims as challenging the reasonableness of Sprint's rates (which are set by tariffs filed with the FCC). Section 201(b) of the FCA prohibits "unreasonable practices" and § 207(b) of the Act allows customers to challenge violations of the Act. 47 U.S.C. §§ 201(b) & 207.

The plaintiff moved to remand, arguing that the FCA did not completely pre-empt the state law claims.

Sprint responded by essentially abandoning its argument of complete pre-emption and instead, arguing that the court should find jurisdiction on the basis of artful pleading alone, regardless of whether there was complete pre-emption.

The district court's decision. Without deciding the issue of complete pre-emption, the district court held that the state claims were actually artfully pled federal claims. App. B2-3.

Turning to the merits, after finding federal jurisdiction, the Court addressed Sprint's motion for judgment on the pleadings and entered judgment in Sprint's favor. App. B5-9. The Court noted the inequity of Sprint's unappealing justification for unilaterally dishonoring its agreement:

> [o]n it's face [Sprint's reasoning] is not a very appealing explanation, a variation of "I know I agreed to do this" and "you are paying the agreed upon price, but it is too difficult for me to deliver so I am just going to deliver 25% of what I agreed to deliver. God speed and good luck to you."

App. B1-2.

The Court, nonetheless, found that because it was a regulated carrier under the Federal Communications Act of 1934, under the filed tariff doctrine Sprint could abrogate its obligations. *See*, 47 U.S.C. § 203. (West 1998) ("FCA"). (App. 1 at 1-2). The Act requires all carriers to file their rates in tariffs with the FCC and to charge customers in conformity with those tariffs. 47 U.S.C. § 203 (West 1998). The Act provides no cause of action for breach of contract or fraud. Rather, it expressly preserves the state law remedies. 47 U.S.C. § 414 (West 1998).

Notwithstanding that Sprint's contract with the plaintiff and its original tariff both provided for free calls for one full year, the district court concluded that granting the relief sought by the plaintiff—i.e., compensating her and the class members for their cost of calls made on Fridays—would amount to "modifying the [second] tariff and only the FCC has that power." App. B5-6. The Court also concluded that no injunctive relief to stop the deceptive advertising was available. App. B8-9.

The court refused to consider the plaintiff's other argument that her entitlement to free Friday calls for a year vested under the terms of the original tariff, and therefore precluded Sprint's attempt to retroactively eliminate its obligations by amending the tariff. App.

6-7. The Court entered a judgment on the pleadings in favor of Sprint, and the plaintiffs appealed to the Seventh Circuit.

The Seventh Circuit's Decision. On Appeal, the Seventh Circuit affirmed the district court's order in all respects. App. A. The panel, opinion by Chief Judge Posner, found that the contract claim was a federal cause of action because if it prevailed it would effectively invalidate Sprint's second tariff. The Seventh Circuit reached this conclusion despite this Court's holding to the contrary in *Mottley*.[1] App. A6-7. Although the decision carefully avoided using the term "complete preemption," it appears to use that as the basis for jurisdiction. App. A6-7. If upheld, this case marks only the third statute enacted by Congress which provides complete pre-emption.[2]

Having found jurisdiction, the Seventh Circuit then concluded that the contract claim was barred by the filed tariff doctrine, and that the claims for common law and consumer fraud were also barred—even to the extent that they sought purely injunctive relief to require Sprint to honestly disclose its practices. App. A8-10.

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[1] *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

[2] Complete preemption has been found under only two statutes: the Labor Management Relations Act § 301, codified as 29 U.S.C. § 185(a), *see Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983); and claims under ERISA. *See, Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Outside of the statutory context complete preemption has only been found in cases challenging the ownership of Indian Tribal Land. *See*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974).

Finally, although the issue was extensively briefed, the Seventh Circuit omitted any ruling on the issue of whether the plaintiff was entitled to enforce the time period terms of the original tariff.

REASONS FOR GRANTING THE WRIT

In both finding jurisdiction and holding that no relief—including injunctive relief prohibiting deceptive marketing practice—is allowed the Seventh Circuit has enlarged an already sizable split on these issues among the Circuits. The issue of first impression of the enforceability of a specific time provision in a filed tariff presents an additional need to grant the writ.

I. THE FEDERAL CIRCUITS ARE HOPELESSLY CONTRADICTORY OVER WHETHER THE FEDERAL COMMUNICATIONS ACT FEDERALIZES STATE LAW CLAIMS ASSERTED AGAINST A REGULATED CARRIER.

As the Seventh Circuit's opinion in this case acknowledged, the federal circuits are split over whether a purely state law complaint asserting state law claims of fraud, breach of contract and state statutory violations is properly removable under the theory that any claims involving long distance phone service *must* arise under federal law since the carriers are required to file their rate tariffs with the FCC. App. A6.

The Circuits utterly clash on whether these are federal claims at all. Even those courts that find federal jurisdiction exists disagree on the basis for jurisdiction—i.e., complete pre-emption, as alluded to in this

case,[3] federal common law,[4] or some other theory. Further, some courts have held that certain claims, such as contract claims, arise under federal law while other state claims, such as fraud or deceptive practices, do not arise under federal law.

The correct view, we think, is that the filed tariff doctrine is nothing more than a defense of pre-emption in some cases, and does not itself confer federal question jurisdiction.[5] This Court's decision in *Mottley*, 211 U.S. 149, has been cited hundreds of times as the seminal holding that a federal defense does *not* confer jurisdiction. *Mottley* was filed in federal court and explicitly

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[3] Citing *Metro. Life*, 481 U.S. at 63-64 (which states that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character), the Court held that here "[f]ederal law does not merely create a right; it occupies the whole field, displacing state law." App. A6. This decision, however, cannot possibly be reconciled with *Metro. Life,* which went on to find complete pre-emption only because of the additional evidence that Congress intended such an extraordinary power in light of the fact the language in ERISA closely mirrored the LMRA which was the only other statute in which this Court has found complete pre-emption. *Metro. Life*, 481 U.S. at 64-65.

[4] E.g. *In re Comcast Cellular Telecomm. Litig.,* 949 F. Supp. 1193, 1204 (E.D. Penn. 1996).

[5] In fact, Sprint itself routinely files state court breach of contract actions to recover unpaid debts from customers. *E.g. U.S. Sprint Communications Co. v. Computer Generation,* 401 S.E. 2d 573 (Ga. App. 1991); *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.,* 624 N.E.2d 1048 (Ohio 1994). Moreover, Sprint has even successfully appealed a trial court's dismissal of state law claims for money due and unjust enrichment—based on Sprint's filed tariffs—where the court had found the claims solely within the jurisdiction of the FCC or the federal courts. *Computer Generation,* 401 S.E.2d 573.

challenged the tariff. *Id.* at 150-51. This Court *sua sponte* remanded for lack of jurisdiction, holding that the Mottleys had artfully pled what was in reality a federal defense that the tariff pre-empted their contract claim. The opinion below brushes aside *Mottley's* long-standing precedential value as "not inconsistent" with this case by distinguishing it on the fact that the Mottleys' original contract preceded the filed tariff requirements.[6]

Indeed, the focus on the filed tariff as a basis for jurisdiction is entirely misplaced. As *Franchise Tax Bd. of Cal.*, 463 U.S. at 13 held, the proper analysis is whether state law provides a cause of action without reference to federal law. Such is the case here. State law provides a cause of action for breach of contract without any regard or reference to federal law. The federal law,—i.e., the filed tariff—becomes relevant only by way of Sprint's defense that it should not be held accountable under state law.[7]

Every year the federal courts, primarily the district courts, expend incredible volumes of judicial resources deciding if and why state causes of action asserted against common carriers arise under federal law.

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[6] The court's distinction that *Mottley* "couldn't have been thought an effort to enforce a tariff or an appeal to the regulatory commission's power to invalidate one" simply cannot withstand scrutiny. App. B8. As this Court stated, *Mottley* explicitly challenged the meaning and the validity of the Communications Act's tariff provisions. *Mottley*, 211 U.S. at 151.

[7] There is no serious dispute that Sprint's conduct is a breach of contract under state law. Indeed, even in finding for sprint the district court acknowledged as much. App. A2; App. B1-2.

Although it admitted the conflict's existence, the Seventh Circuit's opinion did not acknowledge the full scope of the divisiveness among the circuits. The wide divergence of opinions, some within the same circuit on the same facts, shows the need for this Court to resolve the issue.

Decision by Circuits:

Within the First Circuit one district court has held that there is no federal question jurisdiction. *Financial Planning Inst., Inc. v. AT&T Co.*, 788 F. Supp. 75, 77 (D. Mass. 1992). *Financial Planning* remanded a consumer case alleging common law breach of contract claims. *Id.* And although the Court of Appeals has not directly ruled on the issue, its opinion in *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 n.6 (1st Cir. 1977), strongly indicates that it would also find against jurisdiction.[8] In fact, other courts have cited *Comtronics* as a basis for holding against jurisdiction. *Weinberg v. Sprint*, 165 F.R.D. 431, 439 (D. N.J. 1996); *Am. Inmate Phone Sys., Inc. v. U.S. Sprint Communications Co.*, 787 F. Supp. 852, 856 (N.D. Ill. 1992).

The Second Circuit is in flux. Its decision in *Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486 (2nd Cir. 1968), gave rise to the notion that state claims against regulated carriers arise under federal law, specifically federal common law. Its decision in *Nordlicht v. N.Y. Tel. Co.*, 799 F.2d 859 (2nd Cir. 1986), furthered *Ivy's* hold-

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[8] The court observed that the Act's savings clause preserves causes of action distinct from those created under the Act, such as contract claims. *Id.*

ing. Almost from its inception, however, *Ivy* received wide criticism from courts and commentators for being "extreme" and "questionable."[9] Thus, several courts distinguished or rejected *Ivy* for not deciding removal jurisdiction,[10] for not considering the FCA's savings clause[11] and for not passing muster under the Supreme Court's current requirements for complete pre-emption.[12] Within the Second Circuit, courts questioned and rejected *Ivy*'s viability.[13] And after the Seventh Circuit's opinion in this case, the Second Circuit finally overturned *Ivy's* holding that these claims arise under federal common law. *Marcus v. AT&T Corp.*, 1998 WL 91098 (2nd Cir.

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[9] Charles A. Wright, LAW OF FEDERAL COURTS, § 60 (4th ed. 1983); *MCI Telecommunications Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021, 1022 (5th Cir. 1993).

[10] *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 554 (D. N.J. 1996).

[11] *DeCastro*, 935 F. Supp. at 554; *Am. Inmate Phone Sys.*, 787 F. Supp. at 856; *Financial Planning*, 788 F. Supp. at 77; and *Kellerman v. MCI Telecomm. Corp.*, 493 N.E.2d 1045, 1050-51 (Ill. 1986).

[12] *DeCastro*, 935 F. Supp. at 554; *Am. Inmate Phone Sys.*, 787 F. Supp. at 856; *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 816 (N.D. Cal. 1991); *Financial Planning*, 788 F. Supp. at 77; *OnCor Communication, Inc. v. State of N.Y.*, 218 A.D.2d 60, 63, 636 N.Y.S.2d 176, 178 (N.Y. App. Div., 3rd Dept. 1996).

[13] *Kaplan v. ITT-U.S. Transmissions Sys., Inc.*, 589 F. Supp. 729, 733-36 (E.D.N.Y. 1984) (rejecting *Ivy*'s reasoning in light of more recent Supreme Court and First Circuit Decisions); *Marcus*, 938 F. Supp. at 1166 (S.D.N.Y. 1996) (rejecting *Ivy*'s holding of complete preemption but holding case still arose under federal common law).

(N.Y.) Feb 24, 1998) at *6;[14] *Fax Telecomm., Inc. v. AT&T*, 1998 WL 100547 (2nd Cir. (N.Y.) March 10, 1998) at *5-7.

The Court of Appeals for the Third Circuit has not considered the issue and the district courts are split, with four of the five courts holding against jurisdiction. *Compare, Weinberg*, 165 F.R.D. at 440 (no federal jurisdiction); *DeCastro, Inc.*, 935 F. Supp. at 548-55 (same); *Bauchelle v. AT&T Corp.*, 1997 WL 797675 (D. N.J. Nov. 17, 1997) (same); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 952-60 (D. Del. 1997) (same), *with Comcast*, 949 F.Supp 1193 (holding claims were artfully pled claims arising under federal common law). The split in opinions between *Comcast, Sanderson*, and *DeCastro*—all of which asserted claims arising from the same facts against the same defendant—shows how divergent the views of different federal courts are on this issue, and how much judicial time is constantly being spent considering this issue.

Jurisdiction has never been contested in the Fourth Circuit, which has allowed the removed cases to proceed as arising under federal law. *See Harrison Higgins, Inc. v. AT&T Communications, Inc.*, 697 F. Supp. 220, 221 (4th Cir. 1988) (plaintiff conceded removal was proper); *Transp. Data Interchange v. AT&T Corp.*, 920 F. Supp. 86, 87 (D. Md. 1996) (summarily holding federal question existed under the FCA).

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[14] *Marcus*, however agreed with the Seventh Circuit finding jurisdiction here, on the basis that the case effectively challenged the validity of the tariff and thus the contract claim arose under federal law. It disagreed with the Seventh Circuit that the claims for fraud arose or were preempted by federal law. *Marcus* at *5.

The Fifth Circuit squarely rejects the notion that these claims arise under federal law. *MCI Telecomm. Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021 (5th Cir.), *vacated*, 508 U.S. 957, *prior opinion reinstated*, 2 F.3d 103 (5th Cir.), *cert. denied*, 516 U.S. 978 (1993); *KVHP TV Partners, Ltd. v. Channel 12 of Beaumont, Inc*, 874 F. Supp. 756 (E.D. Tex. 1995); *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996). Indeed, the Seventh Circuit's opinion in this case acknowledges creating a conflict with the Fifth Circuit. App. A6. The Seventh Circuit's reasoning—that the Fifth Circuit's decision was in error because it did not consider *Thurston*[15] or *Rice*[16]—misses the mark. In both of those cases, the plaintiff was a regulated carrier whose federal complaint explicitly pled causes of action alleging violations of the Interstate Commerce Act. Neither of these cases involved removal, or even allegations of state law violations. Thus, they shed no light on whether a complaint filed in state court alleging only state law violations nonetheless arises under federal law.[17]

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[15] *Thurston Motor Lines Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983)

[16] *Louisville & N.R. Co. v. Rice*, 247 U.S. 201 (1918)

[17] The Seventh Circuit's analysis is akin to holding that a complaint filed in state court asserting violations of only state antitrust laws arises under federal law, and supporting that reasoning by citing decisions finding federal jurisdiction in cases asserting federal antitrust claims. *But see e.g., In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp 1181, 1184-85 (N.D. Ill. 1996) (remanding state antitrust claims for lack of federal jurisdiction).

The Sixth Circuit appears to hold the claims do arise under federal law, although the precise basis is unclear and the Appellate decision was in the context of a case where the carrier filed in federal court alleging on the face of the complaint that it was an action to collect under the tariff. *See, MCI Telecomm. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993) (holding the "duty to pay a certain price for phone service is a federal obligation."); *In re Long Distance Telecomm. Litig. v. GTE Sprint Communications*, 622 F. Supp. 282 (E.D. Mich. 1985) (holding federal question existed because state law claims were pre-empted by the FCA).

In a suit filed by a regulated carrier alleging violations of the Act, the Eighth Circuit held there is jurisdiction, but also suggested that a complaint filed by a consumer alleging breach of contract would not be a federal claim. *MCI Telecomm. Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). Additionally, prior to the *MCI* decision, one district court had held such state law claims actually do arise under federal common law. *Thermalcraft, Inc. v. Sprint Communications Co.*, 779 F. Supp. 1039 (W.D. Mo. 1991).[18]

In the Ninth Circuit, district courts hold there is no federal jurisdiction under either federal common law or complete pre-emption. *Boyle*, 766 F. Supp. 809 (remand-

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[18] We also note that *Thermalcraft* was expressly based on the Second Circuit's decisions in *Ivy* and *Nordlicht*. *Thermalcraft*, 779 F. Supp. at 1041-42. Thus its basis is highly questionable since: the Court of Appeals for the Eighth Circuit later refused to consider whether these cases applied, *Garden State*, 981 F.2d at 388; and the Court of Appeals for the Second Circuit has recently overturned its holdings that jurisdiction arises under federal common law. *Marcus*, 1988 WL 91098.

ing for lack of subject matter jurisdiction); *Heichman v. AT&T Co.*, 943 F. Supp. 1212 (C.D. Cal. 1995) (same).

There are no reported decisions on point in the Tenth Circuit and the two unreported district court decisions are split. *Compare, Wickman v. Canandaigua Wine Co.*, 1993 WL 390052 (D. Kan. Nov. 10, 1993) (remanding state law claims for lack of jurisdiction) *with Allstate Asbestos Removal, Inc. v. United Telecomm. Inc.*, 1993 WL 62113 (D. Kan. Feb. 18, 1993) (finding federal jurisdiction based on the Second Circuit's now overturned holding in *Nordlicht*).

Finally, the Eleventh Circuit has found federal question jurisdiction, in a suit filed in federal court by a regulated carrier. *Western Union Int'l, Inc. v. Data Development, Inc.*, 41 F.3d 1494 (11th Cir. 1995). More recently, two of the district courts split over removal of a case in which the complaint alleged only state law claims. *Compare, Lipcon v. Sprint Corp.*, 962 F. Supp. 1490 (S.D. Fl. 1997) (remanding for lack of jurisdiction), *with Mellman v. Sprint Communications Co.*, 975 F. Supp. 1458 (N.D. Fl. 1996) (holding federal question jurisdiction supported removal).

In sum, there is considerable disagreement between the circuits and their district courts over whether state claims asserted against regulated phone carriers actually arise under federal law. Further, even among the courts that do find federal jurisdiction there is substantial disagreement over its basis—i.e., federal common law, complete preemption, or artful pleading of some unspecified provision of the Act. This Court's resolution of this long-divided question of federal jurisdiction is necessary and appropriate.

II. THE FEDERAL CIRCUITS DISAGREE OVER WHETHER THE FILED TARIFF DOCTRINE ENTIRELY PRE-EMPTS ANY STATE LAW CLAIMS AGAINST A PHONE CARRIER WHO COMMITS FRAUD.

Independent of the jurisdictional issue, there is also a circuit conflict over whether the FCA pre-empts all state law claims alleging fraud and deceptive marketing practices by a regulated carrier. The Seventh Circuit's opinion declares that, contrary to the express language of its savings clause,[19] 47 U.S.C. § 414, the Communications Act pre-empts claims of fraud arising from a carrier's deceptive marketing practices. App. A9. The Court went so far as to hold that a state cannot enjoin the deceptive marking practices. App. A9.[20] Sprint currently advertises free Friday calls until the year 2000.[21]

Although the Second Circuit has recently agreed with the Seventh Circuit's holding that the contract claim in this case arose under federal law, it disagreed with the treatment of the fraud claims and the "broader implica-

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[19] The court held that the Savings Act is broadly written, and its plain meaning would preserve the plaintiffs' claims, but went on to hold that it would not enforce the savings clause as written. App. A5.

[20] The issue is not whether Sprint is misrepresenting the terms of its tariff *du jure*. Rather, the plaintiffs seek an injunction requiring Sprint to stop its deceptive practices, which would require it to honestly advertise the fact that its "promise" of Free Friday calls is nothing more than a sham—i.e., that, unlike any other business, Sprint is not bound by its "promise" but instead could unilaterally change the tariff to reduce or eliminate the free calls, and in fact has already done so.

[21] Sprint Corp., *www.sprint.com* (visited April 6, 1998) <http://www.sprint.com/bizpark/bizanswers/moreinfo.html>.

tions that every state law claim challenging a carrier's rates or billing practices necessarily arises under federal law." *Marcus,* 1998 WL 91098 at *5.

The Seventh Circuit's opinion is also in direct conflict with the Illinois Supreme Court's holding that claims for fraud are not pre-empted by the Communications Act. *Kellerman*, 493 N.E.2d 1045. Many other courts have reached the same opinion as *Kellerman*, and, in fact, have expressly agreed with its holding. *E.g., Transportation Data*, 920 F. Supp. at 89; *Cooperative Communications*, 867 F. Supp. at 1515; *Harrison Higgins,* 697 F. Supp. at 223.

Simply put, there is no basis for viewing the Communications Act as pre-empting all state law fraud claims, and instead giving regulated carriers *carte blanche* to fraudulently advertise. The statute itself provides to the contrary. 47 U.S.C. § 414. There is nothing in the language, legislative history, or policy underlying the Act that even remotely supports this conclusion. In light of the tremendous inequities of the filed rate doctrine,[22] this holding is more egregious. If the court will not compel companies to honor their agreements, certainly nothing is gained by prohibiting the states from requiring the companies to be honest in their marketing. Indeed, the need to enforce injunctive relief under state fraud statutes and common law is especially heightened as it may be the only protection left for consumers.

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[22] For an example of the inequities of the filed rate doctrine and the reality that it has outlived its usefulness, and does nothing more than shield phone companies from their acts of fraud and breaches of contract, *see, e.g., Fax Telecomm.*, 1998 WL 100547.

III. THE ENFORCEABILITY OF TEMPORAL TERMS OF A RATE TARIFF PRESENTS AN IMPORTANT AND FAR REACHING QUESTION OF FIRST IMPRESSION.

This case also presents an additional first impression question of potentially far reaching impact, which the courts below refused to resolve: whether a consumer can use the filed rate doctrine to enforce a filed tariff's provision that a rate will remain in effect for a specific period of time. Phone companies are increasingly advertising and promising terms of service which they subsequently unilaterally change. Where these promises are contained in a tariff the carrier simply amends the tariff to reflect the change, as happened in this case. Thus, if this decision is allowed to stand, the terms of the tariff are, in essence, meaningless since the carrier can change them at will.

Thus, as shown in this case, even though the tariff explicitly stated that the consumer could "receive free usage . . . one day a week (such day to be determined by Sprint) for 12 months," Sprint has thus far been allowed to dishonor that term. Especially under the strict auspices of the tariff doctrine, there is no statutory or policy basis for holding that temporal terms of a tariff are not enforceable on the same basis as any other term.

The Court can, and should, use this opportunity to impose *some* control on the deceptive marketing practices of regulated carriers. Upholding the enforceability of *all* the terms of the tariff, and allowing the states to enjoin the carriers to disclose those terms will eliminate much of the unnecessary harshness of the filed rate doctrine.

CONCLUSION

This case squarely demonstrates the need for this Court to resolve a deep conflict among the circuits over whether the Federal Communications Act federalizes and thus creates removal jurisdiction over state law claims for breach of contract and fraud asserted against a common carrier. If the Court finds jurisdiction, it should resolve one conflict over whether the Communications Act pre-empts *all* claims to prohibit deceptive advertising. Finally, the Court should also resolve the important question of first impression—whether consumers can enforce a tariff's promise to keep a filed rate in effect for a specific time period.

Accordingly, the Petitioner prays the Court grant her requested petition for certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
ROBERT J. STEIN III
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 2120
Chicago, Illinois 60601
(312) 606-0500

Attorneys for Petitioner